



POLICE DEPARTMENT

February 15, 2019

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In the Matter of the Charges and Specifications : Case No.
- against - : 2017-18004
Detective Jose Cintron :
Tax Registry No. 946638 :
Narcotics Borough Bronx :
-----X

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB: Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: Marissa Gillespie, Esq.
Karasyk & Moschella, LLP
233 Broadway Suite 2340
New York, NY 10279

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

FIRST DEPUTY COMM.
RECD FEB 15 2019 16:08

CHARGES AND SPECIFICATIONS

1. Detective Jose Cintron, on or about January 18, 2017, at approximately 1520 hours, while assigned to NARCBBX and on duty, in the vicinity of the inside of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he entered [REDACTED] without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 Public Contact - Prohibited Conduct

2. Detective Jose Cintron, on or about January 18, 2017, at approximately 1520 hours, while assigned to NARCBBX and on duty, in the vicinity of the inside of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he searched [REDACTED] without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 Public Contact - Prohibited Conduct

3. Detective Jose Cintron, on or about January 18, 2017, at approximately 1520 hours, while assigned to NARCBBX and on duty, in the vicinity of the inside of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he threatened to kill David Rodriguez's dog without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 Public Contact - Prohibited Conduct
P.G. 214-33 Care and Disposition of Animals

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on November 28 and 29, 2018. Respondent, through his counsel, entered pleas of Not Guilty to the Charges. The Civilian Complaint Review Board (CCRB) called David Rodriguez, Rick Rodriguez and Daniel Casados as witnesses. Respondent called Detectives Petar Simonovic and Fred Dorch; Lieutenant Ray Sanchez; and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of entering [REDACTED] without sufficient authority. I further find Respondent Guilty of searching [REDACTED] without sufficient authority.

Finally, I find Respondent Not Guilty of threatening to kill David Rodriguez's dog without sufficient authority. I recommend that Respondent forfeit 15 vacation days.

ANALYSIS

The following is a summary of the facts which are not in dispute. On January 18, 2017, at approximately 1520 hours, while assigned to Bronx Narcotics, Respondent traveled to the home of David Rodriguez ("Rodriguez"), located at [REDACTED], Bronx County. Accompanying Respondent were then-Sergeant Ray Sanchez, Police Officer Lenox, then-Police Officer Peter Simonovic, and then-Police Officer Fred Dorch.

Respondent and his team were there to investigate a complaint that David Rodriguez was growing marihuana at that location. On November 17, 2016, [REDACTED], David Rodriguez' [REDACTED] had filed a complaint in which she alleged that [REDACTED] was growing and using marihuana in the home where [REDACTED] lived. Respondent received the complaint on December 8, 2016 (T. 289). He began his investigation by calling the telephone number she provided in the complaint but he was unable to reach her (T. 290). In addition, he ran computer checks on David Rodriguez using his name and date of birth; conducted visual surveillance of [REDACTED]; and directed a confidential informant to attempt to make a purchase at the premise (*Id.*). None of these investigative steps provided evidence tending to support the allegation that the home was being used to grow marihuana (*Id.*).

In early January 2017, Respondent's commanding officer requested an update on the progress of the investigation. According to Respondent, he wanted to know "what was being done about this 'grow house' due to the fact that there was a sensitive issue with the chief from the Fire Department¹ who had passed away from a marihuana 'grow house'" (T. 290-291).

¹ The Tribunal takes judicial notice that Battalion Chief Michael Fahy, FDNY, died on September 27, 2016, while responding to a call about leaking gas in the Bronx. Chief Fahy was fatally struck by flying debris when there was

Respondent informed his commanding officer of the steps he had previously taken, asserting that he was "coming to a roadblock because we have nothing so far in regards to actually knowing that there was a marihuana 'grow house' actually at this location" (T. 289-291, 314-317). Based upon a suggestion from his commanding officer, Respondent requested information from Con Edison regarding the electrical usage at [REDACTED] by leaving several voicemail messages but received no response (T. 291-292).

On January 18, 2017, Respondent arranged with his sergeant to visit [REDACTED] "to get a feel of it to determine whether...anything stands out or [whether there is] any smell . . . and if not, then I was going to close the complaint, because at this point I was at a roadblock. There was really no indication that there was a marihuana 'grow house' at this dwelling" (T. 293).

Respondent and his team approached the front door of the home and were met by Rick Rodriguez (Rick). Rodriguez' son. Respondent told Rick that he was investigating a gas leak complaint, a representation he admitted at trial was a ruse.

Rick denied knowing anything about a gas leak and called his father from the basement. Rick and Respondent had a subsequent conversation, the details of which are in dispute. Rodriguez eventually came upstairs to the front door and had a conversation with Respondent, the content and circumstances of which are also in dispute. Finally, Respondent and his team entered [REDACTED] and eventually searched the basement; the circumstances of their entry and search is in dispute.

an explosion on the premises, which had been used to grow marihuana (<https://www.nytimes.com/2018/07/13/nyregion/marijuana-grow-house-explosion-bronx.html>).

There is no dispute that at the time of the search, Respondent did not have a search warrant and did not request consent to search from anyone on the premises.

When Respondent and his team walked through the basement, they observed marihuana plants. Respondent's team detained Rodriguez at the location while he went to court to apply for a search warrant. Respondent eventually received a search warrant, returned to [REDACTED] [REDACTED] and seized the marihuana plants. Rodriguez was arrested and charged with felony possession of marihuana². Neither Respondent nor any other member of his team attempted to remove Rodriguez' [REDACTED] from the premises (T. 123-124).

At issue in this case is: (1) whether Respondent had legal authority to enter the premises; (2) whether Respondent had legal authority to search the premises; and (3) whether Respondent threatened to harm Rodriguez' dog.

The following is a summary of the testimony at trial. Rodriguez testified that on January 18, 2017, he was sleeping in the basement when he heard his son Rick calling downstairs that the police were at the home and that they were saying there was a gas leak (T. 37, 37). Rodriguez replied, "That's bull crap; we don't have a gas leak," and went upstairs (*Id.*). As Rodriguez arrived on the main floor, he observed Rick walking toward him, as he took his dog to the backyard through the kitchen (*Id.*).

As Rodriguez approached the front of the house, he saw that Respondent was already inside the foyer (T. 37). When he arrived at the front door, Rodriguez observed two Hispanic officers standing near the doorway on the porch, as well as two African-American officers standing on the outdoor staircase leading to the porch (T. 37-38). According to Rodriguez, Respondent told him, "You got to get out of the house; there's a gas leak. We're evacuating all

² Rodriguez later disposed of the charge in exchange for a plea to a Class "B" misdemeanor and was sentenced to one (1) year probation.

the houses from here to down the block" (T. 39). Rodriguez replied that there was an elderly neighbor living in the last home on the block whose son was a police officer and asked Respondent, "Can you send one of your guys over here to help her and get her out?" (*Id.*). At that point, Respondent placed his hand on Rodriguez' chest and pushed him back into his home. Rodriguez said, "What are you doing? Can you go and check on Ms. X?" (*Id.*, 49-50). As Respondent continued pushing Rodriguez back into the foyer, the two Hispanic officers entered the home and came toward him (T. 39-40). Respondent then tried to grab Rodriguez' right wrist and pushed him toward the staircase which lead to the second floor (T. 40). Respondent then stated, "I smell marihuana; I smell pot in here" (*Id.*). Respondent, while trying to hold onto Rodriguez' wrist, attempted to step behind him but Rodriguez moved against a wall, preventing Respondent from doing so (T. 42-43).

Rodriguez testified that he said, "What are you talking about? I've been sleeping; nobody is here smoking." Respondent then said, "I know you got marihuana here. I know what you got in the house; I know you got something downstairs." Rodriguez replied, "I don't know what you're talking about; do you have a warrant? Why are you in my house?" (T. 44).

According to Rodriguez, Respondent then said, "Don't worry about it. Do as I say or I'm going to take your [REDACTED] and I'm going to lock your son up. Let's go to where you got the plants at" (*Id.*). Rodriguez testified that he then surmised that Respondent was a friend of [REDACTED] to whom she had provided information about his marihuana activity in order to harass him; in Rodriguez' estimation, that would be the only way that Respondent would know that he had marihuana growing in his house (T. 44-45, 49). Rodriguez then asked if he could call [REDACTED] whom he asserted was a Member of Service. Respondent and the two Hispanic officers replied, "No, no, don't worry about [REDACTED] he doesn't have to get involved with this; we already know about [REDACTED]" (T. 46). Rodriguez testified that the claim the police

officers knew about [REDACTED] confirmed in his mind that [REDACTED] had "sent" them (*Id.*).

Respondent said, "Just go downstairs to where [you] have [your] stuff at, [otherwise we're] going to lock [your son] up or take [REDACTED] away" (T. 46-47).

Rodriguez testified that he replied, "Alright then, let's go downstairs," believing he had no option to refuse because they were threatening him (T. 47). After he was ordered to open the door leading to the basement, he led Respondent and his team down the stairs. Once everyone was in the basement, Rodriguez opened a second door leading to a "music room." Once the door was opened, Rodriguez walked approximately 30 feet across the room to another door which led to a storage area. Rodriguez opened the door, walked about 6-7 feet and led the police officers toward a fourth door, which opened into a combination laundry room and boiler room.

Respondent asked Rodriguez, "Where's the plants? Rodriguez moved a curtain and showed Respondent 6-7 marihuana plants (T. 47-48, 72). Respondent asked, "Where is the rest of the plants, where's the big one?" Rodriguez laughed and replied, "There's no big plants, this is all that's here." Respondent asked, "You're sure?" Rodriguez replied, "You already walked through the house, you see what you see. There are no big plants here . . . what [did] you expect to see there?" (T. 50).

Respondent then took Rodriguez to the music room while he and another member of his team returned to the laundry room to take photographs (T. 50, 52). Rodriguez remained in the music room under the control of the two African-American police officers (T. 96-97).

Respondent eventually left the basement and returned at about 1930-2000 hours (T. 50-51). Rodriguez testified that his relative came to the house and asked one of the police officers whether they had a search warrant; someone told her, "Don't worry about it; mind your business" (T. 51). Rodriguez overheard the conversation from the basement, where he remained

with police officers (*Id.*). When Respondent returned to [REDACTED] Rodriguez was placed under arrest (T. 54).

On cross-examination, Rodriguez admitted that he smoked marihuana daily as a form of pain management for chronic back pain and had done so for approximately ten years (T. 79-80). Depending on his pain level, Rodriguez smoked marihuana between 3-10 times during the course of a day (T. 82, 100-101). According to Rodriguez, smoking marihuana relaxed his mind and helped him forget how much pain he was in; he claimed that marihuana did not get him "high" in the common sense of the word (T. 87, 88). When he uses marihuana, he is able to work, remember measurements and move about, albeit slowly (*Id.*). Rodriguez worked in the construction industry and as a part-time disk jockey prior to several back and neck surgeries (T. 80). When he was unable to work in the construction field, he was supported by his wife but also worked sporadically as a disk jockey (*Id.*, 101). Rodriguez conceded that he sometimes has issues with his memory but was unsure of whether his memory lapses were due to long-term marihuana use or the aging process (T. 84-85). He admitted that he wanted the police officers to be held accountable for illegally entering his home but did not want to hold the City of New York or this Department accountable (T. 94).

Rick Rodriguez testified that sometime after 1500 hours on January 18, 2017, he was sitting in his living room when he heard footsteps on the outdoor steps to his home; he looked through the living room windows and saw men ascending the stairs (T. 108). When Rick went to the front door, Respondent told him, though the closed storm door, that there was a gas leak in the neighborhood and that they were evacuating homes (*Id.*). Rick then opened the storm door wide enough to stick his head out, but Respondent pulled it open even wider. When he asked Respondent to repeat what he had just said, Respondent grabbed the storm door, held it open and opened the gate to prevent the storm door from closing (*Id.*). Rick testified that he was

frightened and did not understand why Respondent was "snatching" the door from his hand or why he was "trying to force" his way into the home (T. 108 110, 136 137). He saw two light skinned males, as well as two African-American males, standing behind Respondent (T. 110).

Respondent then "proceeded to try to make his way into the house." When Rick said, "Stop wait, I have a Rottweiler inside the house," Respondent drew his weapon, holding it at his side pointing toward the floor, and said, "Put the dog away or there will be casualties within the home" (T. 111-112, 142-143). Rick went back into his home and released his dog into the backyard (*Id.*). He then went toward the basement, where he banged on the wall to wake his father, who was sleeping there (T. 112). Rick yelled, "The cops are here" (*Id.*).

When Rodriguez emerged from the basement and walked to the foyer, Respondent grabbed him by his wrist told him that there was a gas leak in the neighborhood and the homes were being evacuated; another officer grabbed Rodriguez by his elbow (T. 113). Rodriguez said, "What are you talking about?" Respondent repeated that there was a gas leak in the neighborhood and that it was reported by [REDACTED] (T. 114). Rick understood [REDACTED] [REDACTED] to be a neighbor he referred to as [REDACTED] who lived [REDACTED] (*Id.*, 116-117). Rodriguez replied, "She's an elderly woman; if she reported a gas leak, can you please go check on her to make sure she's okay?" (*Id.*). Respondent said, "No, we want to check here first; this is where [we] want to be" (*Id.*) While Respondent was replying to Rodriguez, he was "forcing" him backward toward the stairs, where Rodriguez eventually sat down (*Id.*, 117). Rick then sat next to him on the staircase (*Id.*)

At no point from the time Rick answered the door to him sitting next to Rodriguez on the stairs did Rick grant Respondent permission to enter their home (T. 115). At no point did Respondent request permission to enter (*Id.*). Moreover, Rick was never informed that he had a

right to refuse permission to enter (*Id.*). He testified that he did not see any Fire Department, Con Edison or National Grid personnel in front of his home (T. 118).

Respondent again asserted that there was a gas leak but then said, "You smell that? Smells like a lot of marihuana in this house. It's really strong. Smells like there's a lot of marihuana in this house. Where is the marihuana; we know you have marihuana inside this house. Where is [it]?" (T. 118). Rodriguez replied, "What are you talking about? There's no marihuana here. I don't know what you're talking about" (T. 119). Respondent replied, "Well, we know you have marihuana in here, so tell us where it is or we'll take [REDACTED] and your son and . . . tear [the] house apart" (*Id.*).

Rodriguez told Rick, "It's going to be okay," then told Respondent, "Okay," before leading him into the basement (T. 120). Rick testified that as Rodriguez led the officers into the basement, he asked if they had a warrant and "was told not to worry about that"; this was the first time his father had asked about a warrant (T. 120-121). He remained seated on the stairs and was unable to hear what transpired in the basement between the officers and Rodriguez (T. 121).

When Respondent returned upstairs, he opened the front windows, then asked Rick, "Do you realize how bad it smells in here? Do you realize I could take [REDACTED] away because of how bad the smell of marihuana was in here?" While Respondent was questioning, him, [REDACTED]

[REDACTED] was sitting on the sofa in the living room. Respondent continued questioning Rick, asking him whether he drank alcohol or smoked marihuana, then asked him where [REDACTED] room was (T. 122-123). According to Rick, while she had previously lived at [REDACTED], she moved to [REDACTED] in May 2016, leaving [REDACTED] with [REDACTED] (T. 124-125). Respondent also asked Rick whether [REDACTED] lived with them (T. 125). When Rick asked Respondent, "Why isn't ACS here?" he replied, "Don't worry about that." He asked

Respondent "Where is the warrant?" to which Respondent replied, "You don't have to worry about that; we have this handled" (T. 127-128).

Respondent then walked outside and had a conversation with Person 1, who lived next door to the Rodriguez family (T. 126). At the time, Person 1 was standing on her staircase (*Id.*). Respondent began questioning Person 1 about how well she knew the Rodriguez family and whether she was aware of the activity that was going on in their home (*Id.*). According to Rick, Person 1 told Respondent, "I know my neighbors; I have cameras in front of my house and I see what happens at this house. I see the people that leave this house. It's [Rick, his mother and his father] that live in this house. They don't have parties. They don't have company. They don't have guests. I know my neighbors . . ." (*Id.*).

Respondent then re-entered [REDACTED] and walked down to the basement before exiting again on the basement level with two other police officers (T. 128). After Rick saw Respondent leave, he went to the basement, where he saw Rodriguez with the two African-American officers (T. 128-129). According to Rick, his father was already handcuffed but was not adequately dressed, so the officers permitted him to obtain additional clothing for Rodriguez (T. 130).

At approximately 1630 hours, [REDACTED] arrived at the home and picked her up (*Id.*). Shortly thereafter, Rick's [REDACTED] arrived at the home and went to the basement to speak with the officers. She asked to see a warrant but was told "[don't] worry about that" (T. 130-131). Shortly after she returned upstairs, Rick left the home and did not return until about 2230 hours (T. 132).

On cross-examination, Rick conceded that he was aware that his father grew marihuana in the basement and that he smoked marihuana in the basement; he asserted, however, that there

was no smell of marihuana plants or burnt marihuana in the home because his father smokes in the basement and burns incense in the downstairs hallway (T. 140-141).

Rick conceded that during his CCRB interview on June 21, 2017, he denied that Respondent had ever removed his weapon from his holster; under questioning by the Tribunal, however, he reiterated that Respondent did remove his weapon from his holster and held it at his side (T. 143-144, 154-155).

Daniel Casados, an Investigative Manager employed by CCRB, testified to the authenticity of CCRB Exhibits 5 and 5A, which are, respectively, an audio recording and corresponding transcript of a telephone call between Rodriguez' neighbor, Person 1, and a former CCRB investigator, Gabriella Carpenter. An entry regarding the call was made in the CCRB's Complaint Tracking System. Neither Carpenter nor Person 1 appeared to testify. Person 1 did not make a sworn statement at CCRB after the call because she had a scheduling conflict involving a medical procedure. Exhibits 5 and 5A were introduced into evidence as business records (T. 210-219).

In her recorded telephone conversation with Carpenter on June 22, 2017, Person 1 admitted that she could not hear any conversations which may have transpired between [REDACTED] Respondent and either Rodriguez or Rick once they entered [REDACTED]; she was able, however, to see and hear portions of the discussions Respondent had with both men at the door to the premises. Person 1 said that she saw Respondent knocking at the door and also saw when Rick opened the door (CCRB Ex. 5A, p. 4). Person 1 said that Respondent told Rick that (1) "they" needed to come in; and (2) he needed to get his father but the door had to stay

open (CCRB Ex. 5A, p. 4). Person 1 also described a portion of a conversation between Respondent and Rick in which Respondent made a reference to having to shoot a dog³ (*Id.*, 12).

At approximately 1520 hours on January 18, 2017, Respondent and his team, in plain clothes, approached [REDACTED]. Respondent knocked on the door, and Rodriguez's son, Rick, answered the door. Respondent testified that he began the interaction by asking Rick whether anyone had called about a gas leak; when Rick replied that no one had made such a complaint, Respondent asserted that he had been called about such a leak (T. 294-295).

Respondent testified that he discerned that Rick was not the subject of his investigation, so he asked him if his father was home; Rick responded that he was. Respondent then asked to speak with him and Rick informed him that his father was sleeping in the basement. Rick stated that he would get his father and Respondent replied that he would wait (T. 295).

Respondent claimed, "When the young male opened the door, immediately I smelled the marihuana" (T. 294-295). When Rodriguez came to the door, Respondent told him, "You know, I came here for the gas leak, but I smell something other than a gas leak. You want to talk about it?" (T. 295-296, 325, 326). According to Respondent, Rodriguez immediately admitted that he grew marihuana plants and when he was asked where he grew them, admitted that he grew them in his basement (T. 296, 325). Respondent testified that he then asked Rodriguez, "You don't mind if we take a look at that?" to which Rodriguez supposedly replied, "Sure, why not?" (*Id.*). Rodriguez then led Respondent downstairs to the basement through a studio apartment which contained "records all over the place"; finally, they entered an area containing a boiler and hot water tank, where he observed marihuana plants with lighting (*Id.*).

³ As the two portions of Person 1's conversation which pertain to the alleged threat to shoot a dog are partially unintelligible, the Tribunal is unable to make a finding of fact as to the entirety of the utterance she claimed she heard Respondent make.

According to Respondent, throughout the search, Rodriguez was “a very respectful, humble individual” (T. 297). Respondent testified that he did not see or hear anything about a dog, and denied making any threats related to the dog (T. 299, 300-301). He denied ever placing his hands on Rodriguez, shoving his way into the premises or attempting to pin him against a wall (T. 300). Finally, Respondent denied threatening to remove Rodriguez’ granddaughter (T. 299-301, 305).

Respondent consulted with then-Sergeant Sanchez, who advised him to contact the duty narcotics Assistant District Attorney (ADA); Respondent did so and was further advised to go to the courthouse to make a search warrant application (T. 298). Respondent testified that he made the application before a Criminal Court judge who questioned him about the location and what had been found within it (T. 301). He testified that he informed the judge that he had observed marihuana in the basement of the premises and that Rodriguez had “allowed [him] in” (T. 302). Respondent claimed that after the judge signed the search warrant, he told Respondent that he need not have made the application⁴: “when you opened that door and it smelled like marihuana, you had probable cause” (T. 303). Respondent claimed that he disclosed his use of a ruse to the judge as he was being examined.

On cross-examination, Respondent conceded that when he conducted his computer checks of Rodriguez, the search yielded no results for open warrants, or I-cards (T. 309). Respondent further conceded that when he went to [REDACTED] on January 18, 2017, he did not have enough information to have applied for a search warrant but denied that seeking consent for a search was his last resort (T. 317). He also acknowledged that he used a possible gas leak as a ruse, aware that it raised a public safety issue but electing to use it because it would

⁴ While Respondent testified about the search warrant affidavit and his examination by the judge, the Tribunal was not provided with a copy of his affidavit.

conceal his true purpose for being at the premises (T. 327-328). Respondent also conceded while he claimed he could smell marihuana as soon as Rick opened the front door. New York does not criminalize the burning of marihuana inside a person's home (T. 328-329). Finally, Respondent conceded that he was unable to distinguish the scent of burning marihuana from that of raw marihuana and that he was unfamiliar with the scent of marihuana plants (T. 330-331, 359).

Respondent claimed that he was invited into [REDACTED] (T. 332, 351). He further denied that he ever asked anyone in the home for consent:

MS. MANIGO: So you didn't think he was a threat, but you also didn't mention to [David] Rodriguez that he had the right to refuse consent, right?

RESPONDENT: There was no reason for me to tell him that, because, first of all, I was not trying to get into the apartment. I was trying to -- the reason why I went to that location is to get an idea of who was behind that door. There was no reason for me even to discuss about consent of search because that was not my intention. My intention was to find out who was behind the door, and then if nothing is going on, nothing stands out, the case is going to be closed

(T. 337 338).

Respondent conceded that he took no steps to remove Rodriguez' [REDACTED] from the home, despite the reported smell of marihuana, and did not report his findings to the Administration for Children's Services (ACS). Respondent admitted that he did not call ACS because, in his view, Rodriguez was being "courteous" and "wasn't aggressive"; in addition, Rodriguez informed Respondent that [REDACTED] was scheduled to pick her up from his home (T. 333-334, 342-344).

Detective Petar Simonovic testified that on the date of the search, he spoke to Respondent earlier in the day about investigating the house at [REDACTED]. When Rick opened the door, he noticed the smell of "raw marihuana emanating from the door since he opened it" (T.

164-165). Simonovic emphasized throughout his testimony that there was no resistance to the search on Rodriguez's part, and that "everything was cordial to the fullest extent" (T. 166, 196). Simonovic denied using force, or seeing anyone use force, to enter the location and denied making or hearing any threat to harm a dog; he also denied that Respondent had unholstered his weapon (T. 169-170, 194-195). Simonovic acknowledged that the original claims of a gas leak had been a ruse and that Rodriguez had initially said that he did not want to have a problem when confronted about the marihuana, before allowing the officers into his basement (T. 178-180, 185-187).

Lieutenant Ray Sanchez testified that on January 18, 2017, he was in a car near [REDACTED] [REDACTED] observing [REDACTED] on the street, when Respondent informed him that the residents were going to allow the officers to enter the house. By the time Lieutenant Sanchez entered the basement, Rodriguez was already downstairs. Lieutenant Sanchez described Rodriguez as a "total gentleman, nice guy" who claimed that the marihuana was for his personal use and that he did not spend time with "the gangbangers in the area" (T. 227-229, 236-239). After the team found the marihuana, Lieutenant Sanchez advised Respondent to call an ADA to determine how to handle the presence of marihuana plants. The ADA advised Respondent to obtain a search warrant (T. 229-230). Lieutenant Sanchez denied seeing any officers unholster their weapons or hearing any threats to a dog (T. 230-231).

Detective Fred Dorch testified that shortly after Respondent knocked on the door, Respondent signaled that the residents were allowing the officers into the location (T. 258-259). Detective Dorch could not hear the conversation at the doorway because he was standing on the stairs. As he entered the location, Detective Dorch noticed a strong odor of marihuana. Eventually, Rodriguez led the officers down into the basement and explained that he was growing plants for personal use (T. 259-261, 275-276). In Detective Dorch's words, Rodriguez

"pretty much guided" the officers to the basement (T. 282). While waiting with Rodriguez in the basement for a search warrant to be issued, Detective Dorch found him to be "very respectful [and] very welcoming;" he even invited Dorch to return to the home to listen to music (T. 264-265). During his testimony, Detective Dorch did not recognize the "Beware of Dog" signs from the video in evidence as CCRB Exhibit 2 and had no memory of seeing a dog at the location or hearing threats to a dog (T. 262, 282-284).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

I find David Rodriguez credible, for the most part, because several aspects of his testimony were generally corroborated not only by his son, Rick Rodriguez, but also by Respondent's testimony, as well as by one of Respondent's witnesses. Rodriguez' assertion that Respondent's initial statement to him was that he was at the home to investigate a complaint of a gas leak was corroborated by Rick, Respondent and Detective Simonovic. Rodriguez' assertion that he was physically restrained by Respondent in the foyer of his home was corroborated by Rick. His testimony that Respondent threatened him with his son's arrest and [REDACTED]

[REDACTED] removal was also corroborated by Rick. Even allowing for some skepticism about Rodriguez possibly embellishing certain aspects of his testimony, I find his testimony on the tactics employed by Respondent to be reliable.

While counsel for Respondent raised the issue of Rodriguez' possible intoxication at the time of the entry, and Rodriguez conceded that he was a habitual marihuana user, there is

insufficient evidence from which to infer that he was not lucid during his encounter with Respondent.

Similarly, I find Rick Rodriguez credible with respect to the material issues before the Tribunal, namely: (1) whether Respondent used the ruse of a gas leak; (2) whether Respondent asked permission to enter the premises; (3) whether physical and verbal influence was utilized prior to his father agreeing to lead Respondent into the basement; and (4) whether there was a dog on the premises. In reaching this finding, I am mindful of Rick's apparent affection for his father and the incentive to shade his testimony to support him. I do, however, find his testimony unreliable with respect to his assertion at trial that Respondent had drawn his weapon as part of an apparent threat to harm his dog, based upon his prior inconsistent statement to CCRB in which he denied that Respondent had drawn his weapon.

I find Respondent credible with respect to his assertion that he used the ruse of a gas leak in his encounter with Rodriguez and his son; I find the balance of his testimony regarding the circumstances of his entry and subsequent search to be tailored to inoculate him from the infirmities of his actions. I find the following assertions self-serving and unreliable: (1) Rodriguez invited Respondent onto the premises and "immediately" admitted that he grew marihuana in his basement; (2) Rodriguez was a "respectful, humble individual"; and (3) the judge who signed the search warrant volunteered that Respondent had probable cause as soon as he smelled marihuana. Finally, I find Respondent's assertion that Rodriguez voluntarily consented to Respondent and his team searching his basement for the marihuana plants which they eventually seized to be unsupported by the credible evidence in the record.

I similarly find that Detectives Simonovic's and Dorch's testimonies were self-serving and tailored to support a finding that their team's warrantless entry and search were lawful. While I find Lieutenant Sanchez credible, his absence from the porch and foyer of [REDACTED]

[REDACTED] during the critical moments of his team's interaction with Rodriguez and his son render his testimony marginally probative.

1. Unlawful Entry

I find that CCRB has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent entered [REDACTED] without sufficient legal authority. I find that Respondent indelibly tainted the entry and subsequent search of the premise with his threshold misrepresentation that he was investigating a gas leak. In this regard, Legal Bureau Bulletin Vol. 43, No. 5 is instructive.

The Bulletin recognizes circumstances in which a ruse is permissible to convince a suspect to exit his home voluntarily, where there exists probable cause for the suspect's arrest but police officers do not have an arrest warrant. The Bulletin explicitly states: "officers may only use *non-coercive* means to get a suspect to leave his home (emphasis in original)." The Bulletin sets forth one example of a coercive ruse as "feigning exigent circumstances in order to get a suspect to leave his home, such as by telling the suspect there is a gas leak in his home"; such a ruse also violates the rule set forth in *Payton v. New York*, 445 U.S. 573 (1980).

By Respondent's own admission, he lacked probable cause to enter and search [REDACTED] at the time that he visited, and he lacked a warrant of any type. Whatever latitude the law permits police officers in a situation where they possess probable cause to arrest but lack an arrest warrant, they clearly have even less latitude in a circumstance where they lack probable cause to arrest.

Putting aside the prohibited and coercive aspects of this ruse, the use of it tends to undermine the credibility of this Department when dealing with potentially catastrophic circumstances. A citizen of this City, whether law-abiding or career criminal, should have no doubt that when a Member of Service tells them there is a public safety emergency, there is a

genuine threat and they are acting to preserve life, not engaging in “the often competitive enterprise of ferreting out crime” (*see McCommon v. Mississippi*, 474 U.S. 984 [1985] *citing Johnson v. United States*, 333 U.S. 10, 14 [1948]).

I find that there is insufficient evidence of voluntary consent to enter the premises to support a finding that Respondent’s entry was lawful. Examining the totality of circumstances surrounding Respondent’s entry, there is no credible evidence from which a voluntary consent to enter could be implied. Establishing proof of voluntary consent imposes a heavy burden on the proponent (*see People v. Freeman*, 29 N.Y.3d 926 [2017] *citing People v. Gonzalez*, 39 N.Y.2d 122, 128 [1976]; *Bumper v. North Carolina*, 391 U.S. 543, 548-549 [1968]).

For example, when Rick initially opened the door, Respondent grabbed it, opened it wider and insisted that it remain open. Person 1 described Respondent’s repeated instruction to Rick that “the door stays open.” Rick testified that when Respondent attempted to force his way inside the premises, he told him to wait because he had a loose dog inside; Person 1 corroborates Rick’s assertion that there was a dog on the premises. Rodriguez testified that when he came up from the basement, he saw Respondent already in his foyer. Under these circumstances, I find that any consent Respondent perceived either Rodriguez or his son granting was not voluntary. I further find Respondent’s and his witnesses’ description of Rodriguez’ demeanor as cordial and cooperative to be unavailing (*People v. Gonzalez*, 39 N.Y.2d 122, 128 [*“Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle”*]; *compare People v Rivas*, 182 A.D.2d 722 [2d Dept. 1992] [officers obtained consent to enter even where the consenting party could not verbally communicate with the officers but communicated by hand gestures]).

I find that CCRB has proven by a preponderance of the relevant, credible evidence that Respondent entered [REDACTED] without probable cause, a search warrant, voluntary consent, or an exigency; I therefore find Respondent Guilty of Specification 1.

2. *Unlawful Search*

I find that CCRB has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent searched [REDACTED] without sufficient legal authority. As set forth in the analysis regarding Specification 1, Respondent did not enter [REDACTED] lawfully. As such, any observations he made while inside the premises were not made from a place where he was lawfully present.

Respondent testified that when he visited [REDACTED] on January 18, 2017, not only did he lack probable cause but he lacked any objective indication at all that the premise was being used to cultivate marihuana plants. While Respondent claimed to have smelled marihuana in the home, he conceded he could not discern the scent of burning marihuana, as distinct from raw marihuana. While it is possible that Respondent smelled the scent of burning marihuana, such scent would not provide a basis for his actions. Respondent acknowledged that the smell of burning marihuana alone is not probable cause that a crime is being committed, as using marihuana in one's home is not a crime in the State of New York.

Rodriguez and Rick credibly testified that Respondent demanded to see the plants and made threats therein. Although Rodriguez may have been polite to the officers, I find that he was coerced into taking them to see the marihuana plants. Detective Dorch testified that he never heard either father or son give consent to a search, and Respondent himself acknowledged that he believed he had no reason to bring up consent. The presence of five armed police officers in Rodriguez' home is also a factor weighing against voluntariness (*People v. Gonzalez, supra*).

Once he had seen the marihuana plants, Respondent called an ADA, who instructed him to apply for a warrant to search the premises. As discussed above, since Respondent was not lawfully on the premises, his observation of the plants was tainted. Accordingly, the use of information he obtained while in the basement in the search warrant affidavit tainted the affidavit (*compare People v. Arnau*, 58 NY2d 27, 35 [1982])[evidence should not be suppressed where a search warrant is obtained on the basis of information gathered from lawful sources prior to and independent of an illegal entry]).

Finally, although Rodriguez [REDACTED] complaint explicitly referenced her concern about [REDACTED] staying in the home, Respondent and his team did not take any actions which could support a finding that they searched the premises on the basis of an exigency relating to the child.

While counsel for Respondent did not raise this as a defense, the Supreme Court has recognized a limited "emergency" exception to the warrant requirement (*Mincey v. Arizona*, 437 US 385, 393 [1978]). "[T]he Constitution 'is not a barrier to a police officer seeking to help someone in immediate danger'" (*People v. Molnar*, 98 NY2d 328, 331 [2002]). The exception has three requirements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched (*People v. Molnar*, 98 NY2d 328, 332).

The date of Respondent's attempted entry on the premises was 41 days after he received the complaint and 62 days after the complaint was filed, obviating any possible exigency which may have existed through the passage of time. None of the investigative steps Respondent took prior to January 18, 2017, bore any relation to the possible presence of an endangered minor child at [REDACTED]. Although Respondent apparently threatened to have the child

removed once he entered the premises based upon the purported odor of marihuana, he took no action to safeguard the child, such as calling ACS, despite his status as a mandatory reporter to ACS. It is unlikely, therefore, that Respondent was searching the home motivated by the perception of an exigent circumstance concerning the child.

I find CCRB has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent searched [REDACTED] without probable cause, a search warrant, consent, or exigency; I therefore find Respondent Guilty of Specification 2.

3. Threat to Shoot Dog

I find that CCRB has failed to meet its burden of proof by a preponderance of the relevant, credible evidence that Respondent threatened to kill David Rodriguez's dog. As set forth above in the analysis under Specification 1, both Rick and Person 1 asserted that he had a discussion with Respondent about his dog. As previously discussed above in the credibility findings, the Tribunal cannot rely upon Rick's assertion at trial that Respondent drew his firearm and made a reference to "casualties" after being told a dog was on the premise in view of his prior inconsistent statement that Respondent did not draw his firearm. While Person 1 appears to have made an assertion in her hearsay statement that there was a threat to the dog, fundamental fairness requires me to discount her assertion, as significant portions of the material content of the statement were deemed unintelligible by the transcriber. Accordingly, I find Respondent Not Guilty of Specification 3.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 8, 2008. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested that Respondent forfeit 20 vacation days. Since I have acquitted Respondent of the misconduct charged in Specification 3, that recommendation is excessive. I do find, however, that Respondent's misconduct was deliberate and cavalier, warranting a departure from previous Department precedent.

Respondents in previous cases have forfeited up to 10 vacation days due to improper entry into a residence to search for evidence (*Disciplinary Case No. 2015-15012* [June 8, 2017])[Fifteen-year sergeant, with no prior disciplinary history, forfeited 10 vacation days after being found Guilty of (i) wrongfully entering an apartment without sufficient legal authority and (ii) searching said apartment without sufficient legal authority. While the respondent contended that she entered to search for additional suspects or wounded officers, there was no particularized information that suspects or evidence would be found in the specific apartment entered. There was also no factual support for her purported belief that there might be additional injured officers inside that apartment]; *Disciplinary Case No. 2016-15279* [August 3, 2017][Nineteen-year sergeant with no prior disciplinary history forfeited eight vacation days for (i) entering an apartment without sufficient legal authority, (ii) searching said apartment without sufficient legal authority, and (iii) threatening to arrest an individual without sufficient legal authority. During the search for a man that had assaulted a police officer earlier in the day, the respondent, in plainclothes, knocked on the door of an apartment and engaged in a conversation with its resident through the closed door. The resident called 911 and stated that plainclothes police officers were at her door without a warrant telling her to open it or they would break it down. After uniformed officers arrived in the hallway, the resident partially opened the door. The respondent then put his foot in the doorway and stated that he was "trying to catch a fleeing felon." Thereafter, the respondent entered and searched the apartment without the consent, and against the objections, of the resident].

At the time that Respondent entered David Rodriguez's home, he was well aware that he had neither a search warrant nor probable cause. He physically forced the residents into allowing him inside the home, misusing a prohibited and fictitious public safety emergency, and then continued this abuse of authority in order to search the home unlawfully. Based on the foregoing, I recommend that Respondent forfeit 15 vacation days.

Respectfully,

Paul M. Gamble
Assistant Deputy Commissioner - Trials

APPROVED

APR 26 2019

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE JOSE CINTRON
TAX REGISTRY NO. 946638
DISCIPLINARY CASE NO. 2017-18004

Respondent was appointed to the Department on July 8, 2008. On his last three annual performance evaluations, he received a 4.5 overall rating of "Extremely Competent/Highly Competent" in 2018, 2017 and 2016. [REDACTED]

[REDACTED] Respondent has one Excellent Police Duty medal.

Respondent has no formal disciplinary history.

For your consideration.

A handwritten signature in black ink, appearing to read "Paul M. Gamble".

Paul M. Gamble
Assistant Deputy Commissioner Trials